
No. 2371

IN THE

**United States Circuit
Court of Appeals**

NINTH CIRCUIT

CHRISTIAN HERRMANN,
Appellant

vs.

JOHN F. HALL, et al,
Appellees

Appeal from the District Court of the United States
for the District of Oregon

PETITION FOR A RE-HEARING

ROBERT J. UPTON,
Pentec Building, Portland, Oregon

ST. RAYNER & ST. RAYNER,
Chamber of Commerce Building, Portland, Oregon
Solicitors for Appellant

IN THE
United States Circuit Court
of Appeals

NINTH CIRCUIT

CHRISTIAN HERRMANN,

Appellant,

vs.

JOHN F. HALL, MARY HALL, his wife, L. D. SMITH, ROSA M. SMITH, his wife, HENRY SENGSTACKEN, AGNES R. SENGSTACKEN, his wife, Z. T. SIGLIN, J. J. CLINKINBEARD, PHILURA CLINKENBEARD, his wife, S. C. ROGERS, DELIA M. ROGERS, his wife, D. L. ROOD, ELLA M. ROOD, his wife, JAMES T. HALL, ALICE HALL, his wife, WILLIAM O. CHRISTENSEN, MATTIE CHRISTENSEN, his wife, TITLE GUARANTEE AND ABSTRACT COMPANY, a corporation, trustee, TITLE GUARANTEE AND ABSTRACT COMPANY, a corporation, EAST MARSHFIELD LAND COMPANY, a corporation, EASTSIDE LAND COMPANY, a corporation, ANDREW MASTERS, CHARLES H. CURTIS, ANNA JOHANSEN, JOHN WALL, MARY PENNOCK, ARTHUR B. SANDOHL, W. R.

HAINES and LOUISE B. HAINES, HARVEY SMITH, GEORGE CLINKENBEARD, ANNA D. CLINKINBEARD, CHAPMAN L. PENNOCK, ARNE P. HUSBY, A. E. CAVANAUGH, M. A. McLAGGEN and MINNIE McLAGGEN, FIRST TRUST AND SAVINGS BANK OF COOS BAY, a corporation, J. W. VINGARD, MARY A. PETERSON, DORIS L. SENGSTACKEN, VICTOR ALTO, L. GRAYCE GOULD, CORNELIUS WOODRUFF, WILLIAM J. LEATON, JOHN F. BANE, A. W. NEAL, A. R. WELCH, WILLIAM VAUGHN, WILLIAM H. PAYNE, HILDA FREDERICKSON, ELIZABETH SCHIEFFELE, ANTHONY STAMBUCK, GEORGE H. ELLIOT, NELLIE CHANDLER, T. V. JOHNSON, LISI ALTO, J. T. HERRETT,

Appellees.

Appeal from the District Court of the United States for the District of Oregon.

PETITION FOR A RE-HEARING

Now comes the above named appellant, Christian Herrmann, and respectfully petitions the court to re-consider its opinion in the above entitled suit, and for a re-hearing of said cause, for the following reasons:

The court holds that the appellee, John F. Hall, did not violate his duty as agent in acquiring an interest in the land in question, which appellant and his wife had authorized and empowered him to sell

and convey for them, and, hence, that the conveyance of August 31st, 1905, to the Title Guarantee & Abstract Company, in trust for the benefit of said Hall and his associates in the transaction, was a valid sale.

This holding is based upon the ground that "the property was sold outright to Sengstacken and Smith without any restrictions or conditions" on the 17th of May, 1905, and that, therefore, "the sale was consummated as we have shown, on the 17th of May, 1905, and nothing then stood in the way of his (Hall's) agreeing three months thereafter to purchase an interest in the property."

We respectfully submit that the court's holding is erroneous, for two reasons:

I.

There is no evidence in the case showing that "the property was sold **outright** to Sengstacken and Smith **without any restrictions or conditions**" on the 17th day of May, 1905, as recited in the opinion.

The evidence does not show whether the alleged contract was conditional or not. The record is silent on this very important question. The appellees failed to offer any proof to show that their alleged contract was not subject to any conditions.

The court is therefore mistaken in assuming that the land was sold "outright" to Sengstacken and Smith on May 17th, and that the contract was one that "could have been enforced by either the vendor

or vendees," "and that Hall's duty as agent for the sale and conveyance of the premises thereupon and thereby terminated.

It is manifest that unless it be shown, not only what the terms of the alleged contract were, **but also that it contained no conditions** (or if it contained conditions—what they were), that it would be impossible to say that the alleged contract was mutually binding—one that could be enforced by either the vendor or the vendee.

It follows, therefore, that Hall's agency did not terminate on the 17th of May, as contended by appellees, and that the conveyance to the Title Guarantee & Abstract Company, in trust for Hall and his associates, on the 31st of August, 1905, was a violation of Hall's duty as agent and should be set aside.

Moore vs. Petty, 135 Fed. 663 (C. C. A. 8th Circuit).

II.

Assuming, however, that the evidence showed that the alleged agreement of May 17th was a valid, binding and unconditional contract, yet, at most, it was but a mere **executory** contract at the time it was understood between Sengstacken and Hall that Hall was to have a share in the property. The contract was not **executed** until August 31st, 1905. And it is conceded that it was understood that Hall was to have a share in the land **before** that time.

Under these circumstances, it would be immaterial, as a matter of law, whether Hall contracted to sell the property to Sengstacken and Smith on the 17th of May or not; that fact, even if established, would not constitute a defense.

The rule is well settled, where an agent has been authorized and empowered to sell and convey property, as in this case, that such an agent's duty does not terminate when he has entered into a mere **executory** contract of sale; it does not cease until the contract has been **executed** and the title of the property passed to the vendee. And if the agent, after having entered into an executory contract of sale on behalf of his principal, has any understanding with the prospective vendee before such contract has been **executed**, the transaction is absolutely void at the mere option of the principal.

This is the rule of law laid down by the courts both of this country and of England, and there is not a decision to the contrary that we have been able to find after a most diligent search.

Wing & Evans vs. Hartupee, 122 Fed. 897.

Cook vs. Berlin Woolen Mills, 43 Wis. 433.

Parker vs. McKenna, L. R. 10 Ch. App. p. 96.

ROBERT J. UPTON,
ST. RAYNER & ST. RAYNER,
Solicitors for Appellant.

United States of America,)
) ss.
 District of Oregon,)

I, Robert J. Upton, being first duly sworn, depose and say that I am one of the Solicitors in Chancery and of counsel for appellant, Christian Herrmann, herein, and I do hereby certify that in my judgment the within Petition for Re-hearing is well founded and that said Petition for Re-hearing is not interposed for delay.

ROBERT J. UPTON,

Subscribed and sworn to before me this 2nd day of December, 1914.

(Seal)

E. M. HALL,
 Notary Public for Oregon.